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IN THE

Supreme Court of the United States

THOMAS JOE MILLER-EL,

Petitioner,

v.

JANIE COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF FOR PETITIONER

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The record demonstrates that petitioner is entitled not only to a certificate of appealability but, more importantly, to relief on the merits. Respondent contends that the gross racial disparity in the State's peremptory strikes—which excluded 10 of the 11 qualified African-Americans—merely reflected disparate views on the death penalty between whites and blacks. But that argument—perilously redolent of the kind of race-based assumptions condemned in *Batson*—is refuted, not supported, by the record. Viewed against the backdrop of "appalling" racial discrimination in the Dallas County D.A.'s office, the conclusion that the State's proffered race-neutral justifications are pretextual is inescapable.

I. THE STATE'S STRIKES CANNOT BE EXPLAINED BY ITS PROFFERED REASONS.

A. The State's Purported Justifications For Striking African-Americans Apply Equally To Whites Who Were Not Struck.

The State admits disparate treatment of African-American and white veniremembers in numerous respects, including patterns of questioning (Br. 19-20, 35) and peremptory strikes (Br. 9). Its defense of this disparate treatment hinges on a single justification (Br. 1): "the vast majority" of white panelists "favored the death penalty and were willing to impose it, while the vast majority of African-American panelists were either opposed to the death penalty or were unwilling to impose it." Whatever the merit of that racial generalization, on this record the State's claim is "simply too incredible" to sustain the State's peremptory strikes, *Hernandez* v. *New York*, 500 U.S. 352, 369 (1991) (plurality), because the African-Americans struck by the State and the whites accepted by the State actually possessed remarkably *similar* views; if anything, the African-Americans struck were *more* supportive of the death penalty.

Space limitations preclude a juror-by-juror refutation of the State's contention (Br. 35) that its concededly disparate treatment of challenged African-American veniremembers

was warranted by their "divergen[t] views." Three examples prove the point—all the more so since the race-based exclusion of even a *single* qualified veniremember suffices to invalidate the entire process. *See Batson*, 476 U.S. at 95-96.

1. Billy Jean Fields. The State offered (Br. 5) two reasons for its peremptory strike of Fields: his religious belief in rehabilitation could impede his willingness to impose a death sentence, and his brother's criminal conviction. The record shows, however, that, if anything, Fields was *more* supportive of the death penalty than white jurors whom the State found qualified. Fields expressed unambiguous support for the death penalty in his questionnaire. JL 20. He answered "yes" to the question whether he believed in the death penalty, and then wrote that "[i]f you commit the crime[,] pay the pen[alt]y," *id.*; he also answered that he had no "moral, religious, or personal beliefs that would prevent [him] from returning a verdict which would ultimately result in the execution of another human being," *id.* Fields confirmed these beliefs during voir dire, stating unequivocally that he believed in the deterrent effect of the death penalty, JA 108-109, that he had no philosophical or religious reservations about the death penalty, JA 108, that he had never felt differently about the death penalty, JA 109, and, most importantly, that he had no "reservations at all" about imposing the death penalty, JA 111.

The State contends (Br. 4-5) that Fields' religious beliefs would have impeded his ability to impose the death penalty because "Fields asserted his personal religious belief that no one is beyond rehabilitation." Fields actually explained, however, that his religious views led him to *support* the death penalty. JA 108. At the outset of his voir dire, the prosecutor asked Fields to explain how he felt about the death penalty and his ability to impose it. Fields answered: "According to the Old Testament, people were killed if they violated His law. In its extended service, the State represents Him if the crime has been committed and death is warranted"; Fields then explained that in his view "the State is God's extended person" and "if the State exacts death, then that's what it should be." JA 108.

The State's discussion of Fields' voir dire is selective and misleading. Although Fields did suggest that everyone can be rehabilitated, JA 118, the State neglects to mention his unequivocal response to the very next question: *Asked whether he could impose the death penalty on a person that he felt was repentant and could be rehabilitated, Fields answered "Yes."* JA 118-19 (emphasis added). Fields also explained that his willingness to impose the death penalty was fully consistent with his views on rehabilitation: "If for some reason the testimony didn't warrant death, then life imprisonment would give an individual an opportunity to rehabilitate. But, you know, you said that jurors didn't have the opportunity to make a personal decision in the matter with reference to what I thought or felt, but it was just based on the [capital sentencing] questions according to the way the law has been handed down." JA 119. Not surprisingly, the prosecutors wrote on Fields' juror questionnaire that he had "no reservations against" the death penalty. JL 20.[1] Respondent's claim (Br. 5) that Fields was struck because of his views on rehabilitation finds no support in the record.

Indeed, the implausibility of that claim is all the more evident given the views on rehabilitation expressed by a white juror whom the State did not strike. Like Fields, Sandra Hearn indicated on her juror questionnaire that she believed in the death penalty. JL 213. But unlike Fields, who used the explanatory spaces to write "[i]f you commit the crime[,] pay the pen[alt]y," Hearn used the same space to hedge her answer, asserting that she believed in the death penalty only "[i]f a convicted criminal continue[s] to commit crimes after rehabilitation in prison—especially killing people." *Id.* At voir dire she reiterated: "I believe in the death

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[1] Moreover, Fields appeared in all respects to be a quintessential State's juror. A veteran, he was 47 years old, had worked for the Postal Service for 18 years, was married with four children, and attended church regularly. JL 15-16; JA 125-27.

penalty if a criminal cannot be rehabilitated and continues to commit the same type of crime. *I do not think anyone should be sentenced to a death penalty on [a] first offense.*" JA 694 (emphasis added). Although Hearn said she "did not see any reason why [she] couldn't sit on a [capital] jury," *id.*, she added that she believed in the death penalty only "for certain types of cases," App.12a-13a,[2] and that "if someone goes out and commits a murder and it's his first offense, I do not think he should have the death penalty imposed upon him," *id.*[3]

Not only did Hearn repeatedly express her belief that death was inappropriate for a first offense of murder, but in stark contrast to Fields, she also clearly stated that her views about rehabilitation *could* affect her ability to impose the death penalty. Asked if she could answer the capital sentencing question about the probability that the defendant would commit another violent crime, she stated, "No, I can't say I could answer that. . . . Well, the evidence would have to be awful strong. People change, so I can't really say I could answer that." App.13a. Hearn even indicated that she could *never* answer "yes" to the continuing threat question for a first offender. App.16a-17a.[4]

Respondent stresses Hearn's willingness to impose the death penalty by asserting (Br. 11) that Hearn "stated firmly . . . throughout individual voir dire that she . . . could assess the death penalty in an appropriate case." But respondent neglects to inform the Court that the *only* first offenses that

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[2] Excerpts from the Voir Dire Record are appended.

[3] Hearn repeatedly reaffirmed her opposition to the death penalty for first-time offenders. App.15a ("I do not believe in the death penalty there. I think that he ought to be given a chance to have rehabilitation."); App.15a ("Q: a person who commits the offense of murder for the first time, it is your belief that person should not receive the death penalty, is that correct? A: Yes, sir. Q: Regardless of what the facts are, regardless of what the circumstances are? A: Yes.").

[4] Hearn said: "I would answer it no. . . . [T]he key word in that question number two is continuing and how can you say a first offender of a capital murder will be a continuing threat to society? . . . I don't think [a person with no prior history can be a continuing threat to society]."

Hearn considered "appropriate" for the death penalty were "torture" and "extreme child abuse." App.14a. In fact, at the close of voir dire, she again confirmed that she "couldn't assess the death penalty" on a first offender. App.17a.[5] Given that the potential impact of Hearn's views on rehabilitation was far greater than that of Fields, the notion that Fields was struck because of his views on rehabilitation is "simply . . . incredible." *Hernandez*, 500 U.S. at 369.

The State's claim (Br. 5) that it struck Fields because his "brother had been convicted of a felony" is also patently implausible. Fields noted that his brother "was arrested and convicted on [a] number of occasions for possession of a controlled substance," that his brother had "served time," but that he did not "really know too much about it." JA 124; 133-34. The following colloquy then took place (JA 124): "Q: Do you feel that that would in any way interfere with your service on this jury at all? A: No."

White veniremember Noad Vickery similarly noted that his sister had been convicted of a criminal offense, that she had "served time in the penitentiary" but that he "was a teenager [at the time] and d[i]dn't know the details." JA 435-36. The following colloquy then took place (JA 436):

> Q: Would that affect your ability to serve as a juror in this case?
>
> A: I don't think so, no.
>
> Q: You keep on saying 'I don't think so.' When you say I don't think so, you're saying that's no?
>
> A: No, it would not. I'm sorry.

Respondent asserts (Br. 15-16) that Vickery's "circumstances" with respect to his sister's criminal history were "qualitatively different from those of Fields." But other than

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[5] The trial judge then stated, "Let me put that belief of yours aside," and proceeded to explain why her view was inconsistent with the law. App. 17a-18a. With this prompting, Hearn finally answered "yes" to the trial judge's question whether "if the evidence to [question] number two showed you beyond a reasonable doubt that *it ought to be answered yes* . . . could you answer it yes?" App. 18a (emphasis added).

race, the State identified no difference. If anything, Vickery was the *less* attractive juror, given his hedging about whether his sister's criminal past would affect his impartiality.[6]

Even if the combination of the two proffered reasons for striking Fields were somehow greater than the sum of its parts, the State's rationale is still implausible. In addition to having a sibling with a criminal past, Vickery expressed much *greater* hesitation about the death penalty than did Fields. Vickery indicated on his questionnaire that he wasn't sure what he believed about the death penalty, App.4a-5a, and during voir dire stated, "I honestly can't tell you . . . how I feel" about it, App.4a. Yet the State accepted the white Vickery and struck the African-American Fields. Because Fields was indistinguishable from white jurors whom the State accepted, respondent cannot plausibly claim (Br. 35) that it struck Fields based on his "divergen[t] views."

2. Joe Warren. The State argues (Br. 6) that it removed Warren because of his "hesitation about imposing the death penalty and his inconsistent responses during voir dire." Once again, however, the State misrepresents the record, repeatedly taking Warren's statements out of context in an attempt to manufacture "hesitation" and inconsistency when none existed. Noting (Br. 5) that Warren agreed with the death penalty for some cases but not for others (an answer that on its face surely comports with the views of any reasonable supporter of the death penalty, since no one reasonably could support the death penalty in *every* criminal case), respondent then omits Warren's answers to the questions immediately following that statement. He explained that self-defense would be an example of the kind of case for which he did not believe in the death penalty, and that he had "never" disapproved of the death penalty generally, JA 137, 139. Warren also stated that he had no moral, religious, or

[6] A family history of criminality seemed to bother the State only if the prospective juror was African-American. *See* Petr. Br. 22 (describing family criminal histories of four white jurors accepted by the State).

personal objections that would prevent him from imposing it. JL 28. This testimony is neither hesitant nor inconsistent.

Respondent also tries misleadingly (Br. 5) to portray Warren as equivocal for answering "I think I could" about imposing the death penalty. But the passage respondent cites was actually Warren's response to the question whether he could impose the death penalty *directly*, as jurors did under the *old* law—a question the prosecutor himself characterized as a "trick question." JA 141-42. Asked whether he could answer the capital sentencing questions the law in fact would require him to answer, Warren's response was unequivocal: "Q: You're not writing death, but three [yes] answers equal death. Make no mistake about it. Could you do that? A: Yes, I could." *Id.* He later affirmed his ability to impose death, noting that, "[b]ased on the evidence, I would answer [the questions] accordingly." JA 144.[7]

Warren's views were materially identical to those of white panelist Marie Mazza, who served on the jury. Mazza, like Warren, indicated on her questionnaire that she believed in the death penalty, but also, like Warren, wrote that it "depends on [the] crime." JL 148; *compare* JL 28 (Warren: "in some cases"). The State misleadingly omits this qualification (Br. 12). Mazza's voir dire testimony was also remarkably similar to Warren's. Warren explained that the imposition of the death penalty "depends on the case and the circumstances at the time," JA 139; Mazza noted that imposition of the

[7] The State also insinuates (Br. 5) that there were capital cases that Warren did not want to be involved in. The passage cited, however (JA 146), discusses non-capital cases in the context of *minimum* sentencing.

Perhaps most egregiously, the State attempts (Br. 5) to portray Warren as "hesitant" about imposing the death penalty because he supposedly expressed "mixed feelings" about whether it served a purpose. But reading the cited passage in context reveals that Warren actually believed that the defendant might not suffer *enough* if he were executed. JA 140 ("[S]ometimes you feel that it might help to deter crime and then you feel that the person is not really suffering. . . . So, . . . sometimes you have mixed feelings about whether or not [the death penalty] is punishment.").

death penalty "is not an easy [decision] and I feel that it depends upon the case, the testimony," App.5a.

Moreover, the State's explanations for its strikes to *this* Court reflect a new racial double standard. The State simply absolves Mazza for her expressions of hesitancy, claiming (Br. 12) that "[f]or the remainder of the examination, Mazza expressed no hesitancy concerning her ability to assess a death sentence." Yet respondent does not afford the same benefit to African-American panelists. Indeed, she argues explicitly (Br. 36) that African-Americans' subsequent non-hesitating answers could *not* redeem any previous hesitancy.

3. Edwin Rand. The State defends its strike of Rand as based on his supposed "ambivalence" about the death penalty and his ability to impose it. The State argues (Br. 6-7) that Rand showed ambivalence because he described the death penalty as a "touchy subject." But the State omits his full answer, in which he explained—like white juror Mazza—that he meant imposing it would depend on the circumstances, JA 158, and that the death penalty was not appropriate for "self-defense or an accidental type thing." JA 159. While Rand was initially hesitant about imposing the death penalty, JA 161, for the remainder of voir dire he expressed no hesitation whatsoever. Asked, for example, "knowing that, . . . without option that [it] results in . . . assessing the death penalty for that man sitting right down there? Do you feel like you can do that?," Rand answered: "Yes, I do." JA 162. Asked, "you can answer those questions yes knowing that the result would be that that man would be executed?," Rand answered, "Yes, I could." JA 164. When the prosecutor demanded, "You're telling me you can do that?," Rand responded: "Yes." *Id.* Respondent cannot give any explanation as to how this pattern of responses is in any way different from those given by white juror Mazza.[8]

[8] Our opening brief (at 23-24, 26) demonstrates that the other three qualified African-Americans struck by the State—Boggess, Kennedy, and Bozeman—also held views similar to those of white jurors Hearn and Mazza. Here again, the State blatantly misrepresents the record in an attempt to create the appearance of divergent views: The State claims, for example, (Br. 4) that Bozeman classified himself as someone who "could not serve on a capital jury." But when asked specifically whether he could serve on a capital jury, Bozeman twice unequivocally answered yes. JA 82. He also elaborated on this point, noting that "I'd have to vote with the proof, you know, no matter how I felt. If the answer was yes, then I would have to put yes no matter how I felt about it." JA 93.

Because the State's rationales do not withstand scrutiny, no factor other than race remains to explain its strikes of a grossly disproportionate number of African-Americans.

B. The State's Attempt To Demonstrate A Parallelism Between The Whites And African-Americans It Struck Is Specious.

Just as the State fails to demonstrate that the views expressed by African-Americans it struck differed materially from those expressed by white jurors it accepted, so too the State fails in its effort to maintain (Br. 11) that the peremptorily struck African-Americans were materially identical to the four white panelists that it peremptorily struck. Respondent argues that the prosecutors struck three of these white panelists because of mere ambivalence about the death penalty. These veniremembers, however, expressed very strong opposition that was anything *but* ambivalent.[9] In an obvious attempt to portray the fourth panelist's views as more similar to those of the struck African-Americans, the State claims (*id.*) that Penny Crowson was struck despite having "expressed a firm belief in the death penalty." Crowson, however, stated that if she "thought there was a chance that the Defendant could be rehabilitated, [she] would probably not go with the death penalty." App.3a. Asked again about her beliefs, she responded, "I'm not 100% certain that my mind is made up at this moment." App.3a-4a. Contrary to the

[9] Gibson, App.1a ("I don't believe in the death penalty" and could "never" impose it); Holtz, App.2a (death penalty "[i]s inhumane"); Whaley, App.9a ("the death penalty should be the very last resort. It would have to be a very clear-cut case where it was premeditation, obvious premeditation, and a very deliberate and cold-blooded act.").

State's claim, these statements hardly manifest a "firm belief in the death penalty." In fact, all four whites struck by the State held views clearly less supportive of the death penalty than those of the struck African-Americans at issue here.

C. The State's Justifications Were Pretextual; Contrary Findings Reflect An Unreasonable Determination Of The Facts In Light Of The Evidence.

Invoking specified characteristics to justify striking African-Americans when those same characteristics are equally evident in whites not struck is a classic example of pretext. *See* Petr. Br. 43 & n.34. Because, as demonstrated above, the State's reasons for striking African-Americans apply equally to whites whom the State accepted, the conclusion that these reasons are pretextual is inescapable.[10]

Moreover, although a single exclusion based on race establishes a *Batson* violation, the "level of suspicion" about the prosecutor's motives may "be raised by a series of very weak explanations" for peremptory challenges. *See Riley*, 277 F.3d at 283 (quoting *Caldwell* v. *Maloney*, 159 F.3d 639, 651 (1st Cir. 1998)). Here, the "divergent views" rationale for each of the strikes is not just weak, but illusory. The "level of suspicion," therefore, is appropriately very high.

The State seeks solace (Br. 36) in the contention that whether veniremembers are similarly situated is the kind of "subjective consideration[]" that is "not easily assessed from

[10] *See, e.g.*, *Riley* v. *Taylor*, 277 F.3d 261, 279-80 (3d Cir. 2001) (en banc) (pretext where prosecution's reason for striking African-American—that he would be unwilling to impose death penalty—was not supported by the record, and where another African-American was struck absent basis for distinguishing him from white juror not struck); *Ford* v. *Norris*, 67 F.3d 162, 168-69 (8th Cir. 1995) (pretext where prosecutor claimed African-American struck for not being "strong on the death penalty" but where struck panelist's responses were stronger than responses of several accepted white jurors); *Bennett* v. *Collins*, 852 F. Supp. 570, 580, 584 (E.D. Tex. 1994) (pretext where prosecutor claimed African-American struck for not being able to articulate facts justifying death penalty, but white jurors similarly unable to articulate such facts seated).

a cold record." Of course, the trial court has the considerable advantage of viewing the participants' demeanors, but the trial judge is not the sole arbiter of whether a *Batson* violation has occurred.[11] In any event, here the State's justification for disparate treatment rests on the *content* of the panelists' responses, not their demeanor or credibility.

To support its claim that the statistical disparity in the State's strikes simply reflects a racial "divergence of views" on the death penalty, respondent contends (Br. 9-10) that "more than 70% of non-minority veniremembers had no qualms about either the death penalty generally or their willingness to impose it," while "67% of African-American venire members" either opposed the death penalty or were unwilling to impose it. These calculations, however, are based on demonstrably inaccurate characterizations of the veniremembers' views about the death penalty. For example, respondent includes white jurors Mazza and Hearn in the "no qualms" category, even though their voir dire testimony cannot fairly be characterized in that way. *See supra* pp. 3-5; 7-8. And respondent includes African-American panelists Bozeman and Boggess in the "opposed to or unwilling to impose" category, even though they both disclaimed that position during voir dire.[12] Of the 11 qualified African-

[11] *See Riley*, 277 F.3d at 278; *McClain* v. *Prunty*, 217 F.3d 1209, 1221-1224 (9th Cir. 2000); *United States* v. *Serino*, 163 F.3d 91, 93 (1st Cir. 1998); *Coulter* v. *Gilmore*, 155 F.3d 912, 919-921 (7th Cir. 1998); *Horton* v. *Zant*, 941 F.2d 1449, 1457-1460 (11th Cir. 1991).

Respondent now asserts (Br. 32) that "there is no dispute that Miller-El presented a prima facie claim under *Batson*'s first step," but that concession would presumably have astounded the trial judge, who somehow concluded that petitioner had failed to make a prima facie showing, JA 876, despite having been instructed by the court of appeals to the contrary, JA 835.

[12] Although Boggess initially expressed some concern about serving on a capital jury—perhaps in reaction to the prosecution's use of its "graphic" description of an execution—she was clear about her ability to impose the death penalty:

Q: You do believe in the death penalty?

Americans, only four, or 36%, can fairly be described as opposed to or unwilling to impose the death penalty.[13]

Moreover, even if respondent's 67% figure were correct, it would not come close to justifying the prosecution's exclusion of *91%* of African-Americans.[14] Disparity of that magnitude is precisely the kind that is "difficult to explain on nonracial grounds." *Batson*, 476 U.S. at 93. And it renders particularly suspect respondent's attempted refuge (Br. 37) in the "intuitive assumptions" exercised by the prosecutors.

D. The Entire Jury Selection Process Reveals Both Intent To Discriminate And Pretextual Excuses.

1. The jury shuffle

So-called jury shuffles give both sides the opportunity to move "visually preferred" veniremembers toward the front of the panel and thus increase those jurors' chances of selection. *Ford* v. *State*, 73 S.W.3d 923, 931 (Tex. Crim. App. 2002) (Holcomb, J., diss.). Thus, they provide a perfect opportunity to discriminate for those who "are of a mind to discriminate." *Batson*, 476 U.S. at 96.[15] The prosecutors in this case made ample use of that opportunity.

A: Yes.
Q: And you say you could serve on the jury?
A: Yes.
Q: Even though it meant that it might be a tough decision?
A: Yes.
Q: Even though it meant that, if you answered all three of those questions yes based on the evidence, you know it would result in the execution of this Defendant?
A: Yes.
Q: So whatever personal feelings, religious or moral, that you have, you would not have to compromise them; you could serve on the jury and go ahead and answer those questions?
A: Yes.

JA 200. Bozeman also, after initial hesitation, stated unequivocally that he could impose the death penalty. *See supra* note 8.

[13] Baker, App.8a-9a; Mackey, App.10a; Bailey, App.10a-11a; Keaton, App.11a-12a.

[14] Using the State's own figures, African-Americans were a little more than twice as likely to be opposed to or unwilling to impose the death penalty as whites (67%/30%), but they were *seven* times more likely to be peremptorily struck by the State (91%/13%).

Most of the facts about the jury shuffle process during the third week of voir dire are undisputed. During that week, as throughout the process, the prosecutors annotated their juror information cards to indicate the race of each panel member. *See* JL 54-108. The initial array of veniremembers included six African-Americans near the front, in seats 1, 2, 3, 4, 8, and 15. JA 61. After the State's shuffle, the African-American panel members were near the back, in seats 19, 26, 36, 37, 38, and 39. JA 62. The defense then performed its shuffle, which ultimately moved the African-American panel members back toward the front, in seats 1, 2, 3, 4, 7, and 14. *Id.* The State objected to the defense's shuffle, and the trial judge overruled the objection. JA 65.

The obvious reason for the State's objection to the defense's shuffle is that it moved African-Americans from the back to the front of the venire and thus increased the odds of African-Americans serving on the jury. Both alternative explanations offered by respondent are transparently disingenuous. The first basis for the State's objection was that the defense shuffle took place in the central jury room rather than in the courtroom. But as the trial judged noted, "I've sat and practiced law in Dallas County for 25 years or longer and we've always gone to the central jury room." JA 64.[16] The State's second claim was apparently that the defense shuffle wasn't sufficiently vigorous, so that many panel members simply moved from front to back or vice versa. JA 57. But that could hardly have been a bona fide objection, for the State's own shuffle resulted in virtually the same sort of clumping, with four African-Americans in a row near the

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[15] "In practice, the shuffle is used to reconfigure the seating positions of the jury panel to enhance the opportunity to select members of particular racial or gender groups during the voir dire process." D. Bobbitt, *The Texas Jury Shuffle*, 57 Tex. Bar J. 596, 596 (1994).

[16] The 5 preceding shuffles in this case—two each in weeks 1 and 2, and the State's during week 3—all took place in the central jury room.

front becoming four African-Americans in a row at the back. The State's expressed concern reflected nothing more than unhappiness with the movement of African-Americans from the back to the front. That race *alone* formed the basis for this concern is clear; the jury shuffle *precedes* all substantive exchange with individual jurors.

Respondent protests (Br. 22, 37) that racial discrimination could not have been the motive for the State's objection because the prosecution raised the objection before it knew the effect of the defense's shuffle on the ordering of the panel members by race. Putting aside the fact that the State did *not* raise its formal objection until after the results of the defense shuffle had been revealed, JA 59, 64-65, the timing of the prosecution's initial complaint only supports its racial motivation. During the third week of voir dire, the State used its shuffle as a "strategic tool," *Ford*, 73 S.W.3d at 926, to move a clump of African-American veniremembers from the front of the panel to the back. Even before the defense began shuffling, the prosecution could anticipate that the defense's shuffle would cause some of those African-Americans to wind up closer to the front of the panel again. If the prosecutor was upset that the defense employed in reverse the very clumping he had used to push African-Americans away from jury service, his objection was not thereby free of bias. To the contrary, his concern about that sort of clumping plainly was driven solely by the racial composition of the "clump."[17]

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[17] Perhaps recognizing that the State's conduct during the third week of voir dire reveals the racial bias informing its jury selection, respondent notes (Br. 23 & n.48) that during the fourth and fifth weeks it declined shuffles even though those weeks' panels had 2 and 4 African-Americans within the first 15 seats respectively. Any implication of lack of concern with the jury's racial composition is wholly misleading. Indeed the record actually suggests the State's *dissatisfaction* with African-Americans near the front of the venire. First, respondent neglects to acknowledge that the placement of African-Americans toward the front of the venire during both of those weeks occurred only *after* the defense had exercised its right to shuffle (the prosecution having previously declined). The record does not reveal what the placement of the African-Americans was when the State declined to shuffle. Thus, the State's initial decision not to shuffle says nothing about its preferences concerning the racial makeup of petitioner's jury. Second, despite the judge's established practice of requiring the State to go first, the State objected after the defense's fourth week shuffle had moved two African-Americans to the front, and the State sought belatedly to get in a shuffle of its own. App.6a-8a. The judge refused to give the prosecutor a second chance. *Id.* Thus, far from supporting the notion that the State "decline[d] shuffles" when African-Americans were at the front, the record reveals instead that, whenever it had the opportunity—and once even when it did not—the State sought to use its shuffle right to keep African-Americans off the jury.

2. The State's admittedly disparate questioning

Abandoning one of the trial court's central factual findings, respondent now acknowledges (Br. 16) that the State "employed disparate questioning" methods on different groups of jurors.[18] The State used its "graphic script" concerning executions with 8 of 15 (53%) African-American veniremembers, but only 3 of 49 (1.5%) white veniremembers. Petr. Br. 14. Respondent contends that that stunning racial disparity resulted from black and white veniremembers' differing views about the death penalty, but respondent's own numbers do not support her contention. While the State used the graphic script with nearly 3/4 of the African-Americans who expressed any reservation about the death penalty on their questionnaires, by its own count it used that script with only 1/5 of the white panel members who expressed similar reservations.[19] The State offers no explanation for that gap, and there is none other than race.[20]

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[18] The state trial court found that "no disparate prosecutorial examination of any of the veniremen in question has been shown." JA 878.

[19] By respondent's own reckoning (Br. 17-18 & n.39), the State used its graphic script with 7 of 10 African-Americans who expressed death penalty reservations. By contrast, respondent identifies (Br. 18 nn.38, 39) only 2 white panelists who expressed reservations about the death penalty and were subjected to the graphic script. The other 8 whites who expressed reservations were not subjected to the script.

[20] Moreover, the State's targeting of African-Americans for the tougher questioning of the graphic script may well have produced a self-fulfilling prophecy in which the racially motivated tougher questioning

An equally stark racial disparity is evident in the State's questioning concerning minimum punishments. Again, the State's own figures leave a deliberate effort to exclude African-Americans as the only plausible explanation for the disparity. The State used the manipulative method of not identifying the statutory minimum punishment at the outset with 7 of 8 (87.5%) African-American jurors questioned on this issue.[21] By contrast, according to the State's own count (Br. 19 & n.42), it used that script with only 2 of 36 (6%) white panelists.[22] Once again, the State signally fails to offer any

itself contributed to an apparent racial divergence in panel members' responses. African-Americans were questioned more aggressively, and so they predictably gave more equivocal answers; those answers were then used to exclude them on supposedly non-racial grounds. Thus, the racially motivated questioning method, as much as any genuine divergence in underlying views, may explain any statistical difference in the responses of African-American and white members of the venire.

[21] Respondent accuses us (Br. 19) of a "serious misstatement[] of the record" because our opening brief asserts (at 17) that the prosecution used the manipulative method of questioning with "all but one of the African American jurors." But it is respondent's alleged correction that is misleading. The phrasing of our opening brief should indeed have made clear that the State used its manipulative method of questioning against all but one of the African-Americans *who were questioned about minimum punishments*, not against all but one of the African-Americans altogether. But as respondent's own insistence concerning white veniremembers makes clear, *see infra* note 22, it is the number of veniremembers actually questioned about minimum punishments that constitutes the appropriate denominator for calculating the frequency with which the State used a particular questioning technique. Thus, respondent's assertion that the State used its manipulative approach on only 7 of 15 African-Americans fails to acknowledge that only 8 of those 15 African-Americans were questioned about minimum punishments at all. Respondent uses the larger denominator for African-Americans but not whites in order to reduce inaccurately the apparent gap between the frequency with which the State used that method against African-Americans and the frequency with which it used that method against whites. Forthright analysis requires using equivalent denominators for both groups.

[22] Respondent again accuses us (Br. 19) of "serious misstatement," but again the error proves to be minor and respondent's correction only drives home the accuracy of our point. Our opening brief inadvertently

explanation for this stark contrast in its treatment of black and white veniremembers.[23]

II. THE RACIALLY MOTIVATED STRIKES IN THIS CASE MIRROR THE HISTORY OF DISCRIMINATION IN DALLAS COUNTY.

Respondent's assertion that the statistical disparity in this case is just coincidence is even more implausible in light of the record evidence of the Dallas County D.A.'s history of excluding African-Americans from jury service. Respondent attempts to divert attention from this powerful contextual evidence by quibbling (Br. 28) about evidentiary rulings at the *Swain* hearing. But contrary to the State's assertion, the three *Morning News* articles *were* in evidence at the *Batson* hearing. JA 843-44. Also contrary to the State's assertion (Br. 28 n.61), the statistical evidence in those articles of a pattern and practice of discrimination is in fact uncontested.[24]

stated (at 17) that the State used the friendlier method of questioning with 47 of 49 (96%) white veniremembers when it should have said 34 of 36 (94%). The essential point remains: all but two whites questioned about minimum sentences received the friendly approach, while all but one African-American questioned about minimum sentences had to cope with the State's admittedly manipulative method of questioning.

[23] Respondent's only reply (Br. 18-20) explains nothing about the dramatic racial disparity in the State's questioning. Respondent claims that 7 of the 8 African-Americans subjected to manipulative questioning had expressed some reservation about the death penalty on their juror questionnaires. Putting aside whether that characterization is accurate in all 7 cases—and also putting aside the State's failure to make a similar claim about the 8th African-American even though hesitancy about the death penalty was supposedly the sole trigger for the State's use of its manipulative script—that pattern leaves unexplained the State's failure to use its manipulative method with the vast majority of white veniremembers who expressed reservations about the death penalty.

[24] The State claims that the evidence was uncontested only because it was not admitted. However, the evidence *was* admitted. JA 843-44. Moreover, the State never attempted to contest the accuracy of the cited statistics, objecting to the articles' admission only on the grounds that such evidence of pattern and practice discrimination was irrelevant to a *Batson* claim. JA 841-42. Moreover, both the Henry Wade quote and the

Just as a pretextual explanation for one peremptory strike should increase the skepticism to which additional strikes are subjected, so too should evidence of a pattern and practice of racial discrimination in jury selection by the Dallas County prosecutor's office shed light on the actions of the prosecutors in this case. Not only does the record reveal an "appalling" practice of racial discrimination in jury selection in the Dallas County prosecutor's office, JA 919, but that office continued to distribute a training manual into the 1980's that explicitly directed prosecutors to exclude all minorities from petit juries.[25] Petr. Br. 4. And the prosecutors in this case were found to have engaged in discriminatory jury selection practices in other cases.[26] *See* Petr. Br. 5. Moreover, the statistics cited in the *Morning News* study, (as well as by Justice Marshall in *Batson* itself, *see* 476 U.S. at 104 & n.4 (concurring opinion)), that the chance of a qualified African-American sitting on a Dallas County jury was 1 in 10, compared to 1 in 2 for a white, mirrors the statistical breakdown in this case. To claim that such statistical evidence is not "relevant" to the inquiry here defies rationality, as does the conclusion that the racial disparity *in this case* is not attributable to racial discrimination.[27]

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reference to the 1963 training manual, Petr. Br. 3-4; JA 709-10, are in the March 9 article and are thus also properly part of the evidentiary record.

[25] Respondent misstates the testimony of two witnesses in this regard by asserting unequivocally (Br. 40) that the Sparling paper was no longer in the prosecution manual in 1986. However, both Sparling (JA 741) and Judge Baraka (JA 774) testified that they did not know whether the Sparling paper remained part of the manual in 1986.

[26] Although these cases were "not before the trial court" (Br. 28), both had been decided before the state appeals court made its ruling. As a matter of precedent, therefore, they were before the state courts when the final *Batson* determination was made. Thus they are part of the "evidence presented in the State court proceeding," properly considered when deciding whether the state courts' determination was unreasonable.

[27] Before the state courts, respondent argued that a history of discrimination was "irrelevant" to a *Batson* claim. JA 842 (even if "no black had ever served" on a Dallas jury, that evidence would be "irrelevant" to the *Batson* claim). But before this Court respondent not only concedes that "all relevant evidence should be considered" (Br. 38), but argues that the judge *did* consider such historical evidence in making his decision (Br. 40). However, the record suggests that, in evaluating the credibility of the State's explanations, the judge took no account of evidence the State now concedes is relevant to that determination. JA 877-78 (findings and conclusions making no reference to pattern and practice evidence).

III. THE COURT USED INCORRECT STANDARDS.

A. The Erroneous COA Standard.

Respondent asserts (Br. 42-44) that the court of appeals applied the correct legal standard in denying petitioner's request for a COA, but the court's opinion demonstrates otherwise. To be sure, the court recited the proper COA standard near the outset of its opinion. Its error, however, lay not in failing to *acknowledge* the proper standard, but in failing to *use* it. The very sentence respondent quotes (selectively) as showing the court's reliance on the proper standard betrays its failure to employ that standard. After three pages addressing *the merits* of petitioners' *Batson* claim, the court said: "*Having determined* that the state court's adjudication neither resulted in a decision that was unreasonable in light of the evidence presented nor resulted in a decision contrary to clearly established federal law as determined by the Supreme Court, *we conclude* that this issue would not be debatable among jurists of reason, that courts could not resolve the issue in a different manner, and that the issue does not deserve encouragement to proceed further." JA 961 (emphasis added). In other words, *having determined* that petitioner's claim fails on the merits, *we conclude* that it fails the COA standard of being debatable among jurists of reason. Respondent quotes only the second half of the court's statement in an effort to suggest misleadingly that the court rejected petitioner's request after carefully applying the COA standard. The full sentence makes plain that, on the contrary, the court jumped straight from a rejection of petitioner's claim on the merits to a rejection of petitioner's request for a COA, a leap that leaves no doubt that the court of appeals failed to

give any attention to the distinct "threshold inquiry" required by *Slack* v. *McDaniel*, 529 U.S. 473, 482 (2000).

B. The Erroneous Merits Standard.

When it comes to the relationship between sections 2254(d)(2) and 2254(e)(1), respondent appears to accept much of our position. She agrees (Br. 47-48) that the two sections establish distinct standards, and that in cases involving multiple findings contributing to an overall factual determination, the correctness of the particular findings must be assessed under § 2254(e)(1)'s clear and convincing standard and the ultimate factual determination must be judged under § 2254(d)(2)'s unreasonableness standard. Respondent also seems to accept (Br. 48-50) that "when the court reviews a claim whose resolution depends on a single factual determination," the § 2254(d)(2) and § 2254(e)(1) standards are, as a practical matter, equivalent. *See* Petr. Br. 37 n.30.

The court of appeals, however, failed to apply these principles. Instead of treating § 2254(d)(2) and § 2254(e)(1) as distinct but in this case equivalent standards, the court layered one on top of the other, thus creating a compounded, more demanding, standard of review. The court held that it was not enough to show that the state courts' factual determination was "unreasonable . . . in light of the evidence presented," or that their factual finding was incorrect by clear and convincing evidence. Petitioner had instead to bear the burden of demonstrating "*the unreasonableness*, if any, . . . by clear and convincing evidence." JA 960 (emphasis added). As explained in our opening brief (Br. 35-38), that transformation of § 2254(e)(1) from a free-standing requirement into an add-on component of the standard set out in § 2254(d)(2) flies in the face of the statute's text and structure, and conflicts with this Court's reasoning in *Williams* v. *Taylor*, 529 U.S. 362, 411 (2000).

CONCLUSION

The Court should reverse the judgment of the court of appeals and grant the petition for a writ of habeas corpus.

Respectfully submitted,

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APPENDIX

Voir Dire Transcript Excerpts

[485] punishment and then, secondly, probably just as important, your ability or inability to actually on a jury of this type and render a decision or actually participate potentially in the execution of the Defendant?

A I don't believe in the death penalty. I don't know why it was started. I don't think it solves anything. It's the ultimate punishment and it's part of the law and, if the law so renders the death penalty, I can't stop it, but I personally do not believe in it.

Q Is this for any particular reason? Is this a personal feeling that you have about it or --

A It's a personal belief.

Q All right. Have you felt this way for some number of years or just—is it something you've thought about, you know, more seriously, of course, when you were asked or informed that you were going to be a prospective juror on this type of case?

A Oh, I think I answered that my gut reaction was that I don't believe in it and I never really thought much further than that. I

* * * *

[492] Q Regardless of the evidence and regardless of the facts. You could vote for something else, maybe a life sentence?

A Yes.

Q Or some number of years, but never death?

A Never.

Q Okay. About thirteen years ago, the law changed. It's no longer done that way. It's not done directly, but the procedure up to that point is largely the same. You know the evidentiary phases are the same, the same type of testimony

largely is admissible, basically the same types of offenses, you know, very serious types of crimes. In this case, now, it's murder. In some instances it must be murder of a particular class of individual or murder plus another offense. A murder and a robbery is alleged in this indictment. A murder during rape, kidnapping, arson, burglary. The difference comes in at the very end of the trial when you go back to decide—make certain decisions. It is no longer decided directly. Instead, as the Judge told you on Monday, you take back with you two or

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[1024] Jim—I'm going to try and go back over some of the things you say. In the process, if I misstate something --

A I'll correct you.

Q Yes, raise your hand and let me know. In all other circumstances, you believe that a life sentence is a proper verdict?

A Yes, sir.

Q Why do you feel that way?

A I've always felt that the penalty was inhumane. I've never really been comfortable with the death penalty. Rhode Island is—the education there is fairly liberal. In school we spent a lot of the time dealing with social studies and civil court and criminal law and we rehashed that years and years ago and the opinion that I formed at that time was one that I still hold true. There are a number of reasons that I don' believe in the death penalty. I've just never felt that, barring circumstances where police officers are involved, another human's life should be taken. I'm not a believer in the eye for an eye.

Q Okay. I'm going to let you talk as much as you can because every one has heard

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[1211] the death penalty or you believe in the death penalty?

A I believe that it depends on how serious the crime is and it would also depend on whether the Defendant could be rehabilitated. It would depend on—the punishment that I would go with would depend on what their past record was and whether I thought there was a chance to be rehabilitated. If I thought there was a chance that the Defendant could be rehabilitated, I would probably not go with the death penalty.

Q Okay. That's fair. But you do feel, from what you say, that under certain circumstances the death penalty is warranted and it serves a purpose then; is that right?

A Yes.

Q What you're telling us is, there are some people that cannot be rehabilitated. By looking at their past acts and what they've done, you could tell if they could not be rehabilitated; is that right?

A Well, for instance if they committed a murder and were paroled from prison and then went out and did it again, I wouldn't

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[1221] you paraphrase that? Does that mean he did not do it under the heat of passion? Are those the words that you used before?

Q No. That's something different. That asks if the deceased, the person killed, provoked the killing in any way. Did he do something to provoke his own killing. If he didn't, you have to answer that question yes because the killing was unreasonable. If he did, you would have to make a decision whether the killing was reasonable in response to any provocation.

You've said that you believe in the death penalty under certain circumstances. How long have you felt that way?

A Probably—I don't consider myself being that old—probably not since college. I probably didn't make up my mind. I'm not one hundred percent certain that my mind is

made up at this moment, but I would say that I pretty much—maybe since I was twenty-one or twenty-two.

Q Okay. So five or six years, something like that?

A Uh-huh.

* * * *

[1572] Q Okay. I see the distinction you're making there. I understand a little better what you're saying now. Can I ask you, Mr. Vickery, how you feel personally about the death penalty? Do you feel that it serves a purpose in our society? I remember growing up that there were shows, Queen for a Day or something like that, and if you were governor for a day or if you had the power to decide in the State of Texas whether there was a death penalty or not, would you have the death penalty in certain circumstances or would you not have it at all? How do you feel about it?

A I really don't know how I feel about it, to be honest with you. I think possibly it is something that is required, but then again as a human being, it's hard to say that you want to see someone die. I just honestly can't tell you, you know, how I feel.

Q I understand that these are difficult things and things that we don't deal with every day or think about. You know that the death penalty exists and you know it's out there, but it is something that other people are dealing with.

* * * *

[1611] enough, yet. Okay. Now, can you take an oath that the mandatory penalty of death or imprisonment for life will not affect your deliberation on an issue of fact?

A Would you repeat that, please?

Q Can you take an oath that the mandatory penalty of death or life imprisonment would not affect your deliberation on an issue of fact?

A Yes.

Q You can?

A Yes.

Q Now, you had indicated on your data sheet that you weren't sure what you believed as far as the death penalty is concerned?

A Yes, I put that on there.

Q And subsequent to that, Mr. Nelson talked with you about it and you indicated, if called upon to take the job, as Mr. Nelson indicated, you could, in fact, perform the job duties and responsibilities basically?

A Yes.

Q All right. Now, understanding—and since he used the analogy of a job, I'll

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[2310] feelings about the death penalty with a few minutes to reflect on it, of course. Now, you've had two or three days. Let me just ask you, Marie, to share with us in your own words how you feel about the death penalty, you know, capital punishment generally speaking and then whether or not you feel you could actually serve on this type of a case or are suited to serve on this type of a case?

A The question has never ever entered my mind before the other day. You know, you hear about things, the different cases and such and people going to—you know, as death being the result. I guess I have never ever realized that that could ever be asked of me, to make that determination. In those other cases, I feel the citizens, my fellow citizens, have had to make that decision. It's not an easy one and I feel that it depends upon the case, the testimony. They have to go from everything to make that decision. The choice they made was unanimously that they felt strongly that this was the decision that they felt they needed to make. It's kind of hard determining somebody's life, [2311] whether they live or die, but I feel that is something that is accepted in our courts now and it is something that—a decision that I think I could make one way or the other.

Q You more or less feel it is a responsibility just like the other type of jury service you were on? No one would disagree with you if you feel that it would be a weighty decision because obviously it would be a very weighty decision, a very, very important decision. Knowing yourself as you do, Marie, do you feel, if called upon and presented the type of facts, that you could make that decision that would ultimately result in the execution of Mr. Miller-El under the law?

A It's difficult, I know—and I've had two days to think about it. Toying with my religious upbringing, my family upbringing and such, it depends upon how I feel that the testimony was presented to me and that would be something that I would feel like I could do. It's difficult.

Q Let me ask you. You mentioned your religious feelings and other factors that you've thought about for the last couple of

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[2471] The lawyers, both sides, thought you looked pretty good, but there are considerations here that I'm satisfied that the case is moving along well enough to allow them to do this.

Off the record, Pam.

(Whereupon, an off-the-record discussion was held.)

THE COURT: It has been agreed that Ms. Salapong and Mr. Doiron will also be excused; is that correct?

MR. MACALUSO: Yes, sir.

MR. CUNNINGHAM: Yes, Your Honor.

(Whereupon, this cause was recessed to Monday, February 24, 1986, at which time the following proceedings were held.)

THE COURT: I would like the record to reflect that we had forty jurors seated according to the order they came up in. The [2472] State declined to shuffle and, over their objection, I told the defense they could have a shuffle and that would be the final shuffle. I believe a shuffle was conducted in the Court's office in box and I believe that both defense counsels and one of the prosecutors had an opportunity to shuffle or reorganize, or whatever you want to call it, the jury cards from downstairs and the final order was arrived at. I handed that to the bailiff who is prepared to recall that order. Is that a fair statement of what went on, Mr. Cunningham?

MR. CUNNINGHAM: That's correct.

MR. WEST: That is a true statement.

THE COURT: My clerk was present in my office when all that occurred, although she didn't do anything more than must observe. [2473] The list is going to be reseated now and that will be the final jury list. I believe the State objects not to having another shuffle?

MR. NELSON: Judge, it is the State's position that the law gives each side the right to shuffle and the Court cannot require the State to waive that right prior to the defense exercising their right, necessarily. Based upon that, we'll object to—although we don't know at this point that we would want a shuffle or not, not being given the opportunity --

THE COURT: Good enough.

MR. WEST: Is the record clear that the Court asked the State whether it did want a shuffle and the State indicated that it did not want a shuffle?

THE COURT: The way I've been operating is, to give the [2474] State the first opportunity to shuffle and if they accept or object, that's it.

MR. CUNNINGHAM: That's the way it is presented, if the State goes first, then the Defendant and then the State.

(Whereupon, the jury panel was seated in the courtroom and the following proceedings were held.)

THE COURT: Good morning again, ladies and gentlemen. I appreciate your patience with us. The first thing I

would like to do—let's see. Sir, on the last row, what is your name?

PANEL MEMBER: Brian Hagler.

THE COURT: What I'm going to do, Mr. Hagler for starters, I'm going to call off the names of some jurors that I'm going to excuse from service in this case. It will be the last row there. You-all may return to the central

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[2990] placed on a gurney. He will be strapped down and he will be taken into what we call the death house. At that point he will have an IV placed in his arm, in one of his veins. Someone will put a lethal substance in that IV and it will be pumped into his body until the life is gone from him, that man right down there. That's what we anticipate is going to happen, Ms. Baker, if the evidence comes out as we anticipate it will. Again, the reason I say that is so you will understand that we aren't really talking in the abstract anymore. We're talking about here and now and real people and real death.

Now, you had a chance yesterday to fill out a questionnaire—or Monday. Excuse me. You were asked your feelings about the death penalty on that questionnaire. If you would, I'd like you to tell us in your own words, number one, how you feel about the death penalty and, number, two, how you feel about your ability to serve on a jury like this where you may have to make this life or death decision?

A First of all, I am not totally in [2991] favor of the death penalty. I feel that it has been reinstated because of the overcrowding that we have in the jail situation now. I can't honestly say that I would be able to sentence another human being to death. I just don't think I could live with myself knowing --

MR. CUNNINGHAM: Your Honor, we can't hear.

MS. BAKER: What didn't you hear?

MR. WEST: The last part.

A Okay. I don't think that I could live with myself knowing that I had sentenced someone else to die. I mean, I was not there. I did not witness it. No matter what evidence you may bring before me.

Q Okay. Ms. Baker, I want you to understand one thing and that is no one is going to force you to serve on this jury. If you tell us that you can't do it because of the feelings you just expressed that you couldn't live with yourself, no one is going to force you to serve on this jury. The law requires you to come down here and make yourself available for us to talk and be what we call a

* * * *

[3748] answered that question. I would like to ask you, if you would, now that you've had a chance to sleep on it and think about it some more to tell us in your own words, first of all, how you feel about the death penalty and whether it serves a purpose and, secondly, how you feel about your ability to serve on this type of a jury?

A Well, as you know I circled both yes and no. I suppose I feel that the death penalty should be the very last resort. It would have to be a very clear-cut case where it was premeditation, obvious premeditation, and a very deliberate and cold-blooded act.

Q Do you feel then that the death penalty in some circumstances serves a purpose in our society?

A Yes, I do. I think it would keep someone from doing it again, protects society.

Q Do you feel like you're the type of person who can serve on a jury where the death penalty is one of the potential punishments?

A Again, it would depend on the circumstances. I think I could make the

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[3949] people have strong feelings, obviously, one way or the other. Do you see what I'm getting at?

A Yes.

Q We want to know how you feel about it ultimately and I'm going to stop talking here in just a minute and let you tell us how you feel personally about the death penalty, for one, and capital punishment and then secondly, your ability to actually serve on this type of a jury or to not serve. You've been asked this question, number fifty-six, and you said "Thou shall not kill"; is that correct?

A That's correct.

Q That's the way you felt Monday when you came down here?

A Yes.

Q Is that the way you feel now?

A Yes

A Yes

Q Just tell us a little bit more, kind of in your own words, how you feel about the death penalty.

A Well, I don't believe a person has the right to say who should be killed and who shouldn't going by what the crime is. Like I

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[4110] very serious case where the stakes are as high as they are, is your opinion. I know you were asked this question about the death penalty here, number fifty-six, "Do you believe in the death penalty?" Originally you circled yes and then you wrote no and you cross out your answer and you wrote "No one has the right to take another one's life." Why don't you just tell us in your own words—you've had a couple of nights to think about it and mull it over in your mind—how you feel about the death penalty and capital punishment generally speaking and then secondly, how you feel about your ability to actually serve on this type of a case and actu-

ally participate in that decision-making process where someone such as the Defendant would be executed?

A My honest opin—I don't believe in capital punishment. Like I said on there, I don't believe anyone has the right to take another person's life. If he committed a crime and if he is convicted and it's proven without a shadow of a doubt, as you say, then, yes, I believe he should be punished. He should be rehabilitated or whatever can be done, but I

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[4307] That man right down there will be taken into the death house. He will have an IV put into his arm and they will start what they call a saline solution in that IV. As he lays there, at the appointed time, a doctor will put a lethal substance into that IV and that substance will be injected into his veins until he dies, until the life is gone from that man sitting right down there, Thomas Joe Miller-El.

I'm not trying to draw horrible pictures or anything, but at some point we anticipate that is going to happen. The jurors that render that verdict are going to have a part in that. Now, I feel like it is only fair that you know that's our position and that's what we anticipate.

Now, on Monday you had a chance to fill out a questionnaire. It's very lengthy and we've gone over those. The one question I want to focus on at least right now is question number fifty-six, "How do you feel about the death penalty?" You answered it. You said, "It's not for me to punish anyone.", I believe are the words you used on it. You've had a couple of three days to sleep on it now and to [4308] think about it. I would just like you to tell us, if you would, in your own words what your feelings are about the death penalty and whether it serves a purpose in our society?

A Well, I still think it's not for me to decide.

Q Okay. Let me go a little bit farther. As I said, we still need two more people to serve on this jury. People who

are going to serve on this jury are going to have to decide after hearing the evidence.

A Yes.

Q First of all whether he's guilty or not guilty and second whether he's going to receive the death penalty or not. We don't want, Ms. Keaton, twelve blood-thirsty people jumping up and down to give this guy the death penalty. That's not the way it's going to work. That's not what we're going to have. What we do need, both sides need, is twelve people who feel that they can make the decisions that need to be made. If the evidence shows that he's guilty, they will find him guilty. If the evidence shows that he is not guilty, they will find him not guilty. If

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[4314] A Can I say something?

Q Sure.

A This is me. I wouldn't even think of killing anybody unless I was trying to save myself.

THE COURT: That's what we need to know, Ms. Keaton, just that kind of thing. How you feel, which way you feel, is important and I think the lawyers would agree. We care how you feel, but we don't care which way you feel. In other words, we just need to know how Ms. Keaton feels about any of these questions including that. I think that's what the lawyers are asking and maybe sometimes they ask it a little different than maybe I would or the other lawyers would, but that's just the way lawyers are. We ask questions different ways at different times, but as long as you tell us how you feel about these things, that's really all

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[4542] Q For certain types of cases?

A Yes.

Q I gather from what you're saying, if you were on this jury, you would take any case or any capital murder case

strictly on a case by case basis and judge that case on its face as presented. The reason I say that is, you said that you have certain things in your mind, for example, that you would want to hear, is that correct, before you feel the death penalty would be justified?

A Yes.

Q In other words, you said for repeat offenders?

A Right. In other words, like if someone goes out and commits a murder and it's his first offense, I do not think he should have the death penalty imposed upon him, but if he goes to jail, serves time—if he gets out and he does it all over again and he's just a menace to society, yes.

Q In other words, you're talking about a continuing course of criminal conduct, serious type of criminal conduct?

A Right.

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[4561] cared less? Do you see what I'm getting at?

A Yes.

Q Allowing that you could hear all that sort of evidence in the first part of the trial when you learn all the dynamics and the full spectrum of behavior, do you think you could learn enough about an individual where you feel you could answer that question yes, this is the type of individual based on what I've learned about him so far that would probably commit some criminal acts of violence in the future?

A No, I can't say I could answer that.

Q Any particular reason?

A Well, the evidence would have to be awful strong. People change, so I can't really say I could answer that.

Q Let me just ask you --

A I could the past, but I couldn't the future part of it.

Q Let me just ask you this: What would be most valuable to you—what would you want to know about somebody to enable you to answer that question yes?

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[4581] A I think it's just putting away a person that really does not belong in our society at all. May I give an example here?

Q Yes, ma'am.

A There was a case not long ago in University Park to where a man posing as a lady scalded—well, you probably know about this—a four month old baby from its waist down. I saw these pictures and he was sentenced to life and my own opinion is that he should have had the death penalty.

Q Because of what he did to that child?

A Right—well, the child ended up dying. It couldn't possibly have lived. That's how I formed my decision.

Q I believe you indicated to Mr. Macaluso that where a person commits murder or a person severely tortures another person or extreme child abuse, that person who commits those offenses should receive the death penalty?

A Yes, sir.

Q You believe that strongly and you have believed that at least for a period of

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[4583] commits that type of offense or a person who severely tortures another person which leads to that person's death is not punishable by the death penalty?

A Yes, sir.

Q Also, a person who is guilty of extreme child abuse, that in and of itself is not punishable by the death penalty under our statutes, but you believe the person who does that should receive the death penalty; is that correct?

A Yes, sir.

Q And you believe regardless of what the statute says that the range of punishment is for a person who commits murder or a person who severely tortures another or extreme child abuse, you still believe that person should receive the death penalty?

A Now --

Q Because of the facts involved with respect to those types of offenses?

A I can't really say that. I think when a murder is committed, whether it is purposely or—a sixteen year old boy or something, this is his first offense, no, I do [4584] not believe in the death penalty there. I think that he ought to be given a chance to have rehabilitation.

Q You've added another factor, the factor of age.

A Right. I pointed that other example out because it was a man doing that to a four month old baby who could not defend itself or anything. When there are adults involved, two adults involved that are responsible per se, especially for their own actions—I shouldn't have pointed that out. I'm getting all confused. In other words, I do not believe in the death penalty on first offense murder unless it is a child involved, a defenseless child. I'm getting myself all mixed up. I'm embarrassed.

Q As I said earlier, you cannot give a wrong answer. It tells us how Ms. Hearns feels. If I understand what you're saying, a person who commits the offense of murder for the first time, it is your belief that person should not receive the death penalty; is that correct?

A Yes, sir.

[4585] Q Regardless of what the facts are, regardless of what the circumstances are?

A Yes.

Q However, in an instance where a young child is involved and you added defenseless, it is your feeling that the

person who commits that offense against that child and that child dies, then the person should receive the death penalty?

A Yes, sir.

Q Even though the law says the person cannot receive the death penalty?

A Yes, sir. I still believe that, which makes no sense, I know.

Q Would you be able to put out of your mind and if you had that type of case that you have designed and you have indicated, just put your personal feelings aside and decide that case based upon the facts and circumstances and, if you believe that the proper punishment from the facts and circumstances called for ninety-nine years, could you give ninety-nine years?

A You're talking about the child?

Q Yes, ma'am.

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[4599] keeps repeating the—doing awful acts to society.

Q With respect to where you said if a person—I think you had said where a person commits murder for the first time, you would not give him the death penalty?

A No—well, no, I wouldn't.

Q Except in one isolated instance that you referred to?

A Right.

Q If you found a person guilty beyond a reasonable doubt of capital murder and you were back there answering the—trying to answer question number two and the evidence had shown you that person had no criminal record, you have no past history. All you have is what you heard in the first part of the trial. Could you answer question number two?

A Well, I would say no, but I would answer it.

THE COURT: You would answer it no?

A Wait.

THE COURT: I just want to know what your answer was.

[4600] A I would answer it no.

Q You would answer it no?

A Yes—the key word in that question number two is continuing and how can you say a first offender of a capital murder will be a continuing threat to society?

Q In other words, you're saying—and I don't want to put words in your mouth—that a person with no prior history cannot be a continuing threat to society?

A I don't think so.

Q In question number thirty-seven you were asked "Do you have any prejudice for, against, or fixed opinions concerning psychiatric or psychological testimony?" You answered yes. Is it for or against?

A I would say both for and against according to the situation. I think that sometimes people bring in a psychiatrist or a psychologist to tell the jury and—well, anyone in the courtroom that this person is mentally incompetent when in actuality they're not and then it works the other way, too. I don't put much store in that.

A Are you saying you don't put too

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[4617] convinces you beyond a reasonable doubt that they ought to be answered yes and, if they do that, then you answer them yes and the result follows.

Now, you said—and I heard it one way and maybe you said it another way and maybe the lawyers heard it still a third and fourth way. I understood you once to say that for a first offender, you couldn't assess the death penalty. I think you said words to that effect.

MS. HEARN: Right.

THE COURT: Let me put that belief of yours aside. That's fine and I'm not quarreling with you. However, in a

capital murder case, if you have found a defendant guilty of capital murder, the law permits these things to occur. This is the evidence that the jury would be allowed to base its answers to one [4618] and two on. It may of course consider the evidence in the first phase of the case that it heard when it found the defendant guilty of capital murder to start with which is—you've heard it explained several ways—knowingly or intentionally causing the death of another individual in the course of committing another felony, so you found the defendant guilty of murder plus an attempted commission or a commission of another felony.

Now, in a capital murder case there is a punishment hearing following the guilt or innocence phase of the case just as there is in any criminal case in Texas. A burglary case has a punishment hearing. A DWI case has a punishment hearing. They all have punishment hearings. At that punishment hearing, both sides are entitled to bring [4619] additional evidence before the jury to help them answer these questions. Neither side has any responsibility to do so and particularly the defendant doesn't have to do anything at all, if he doesn't want to. He may or he may not, but he doesn't have to bring anything and the State does not either. I can't tell you at this point in time whether or not you will hear any additional evidence.

If you did not hear any additional evidence or based on what you heard could you take the oath that if you had, found a defendant guilty beyond a reasonable doubt and you went out and deliberated on one and two, if the evidence to number two showed you beyond a reasonable doubt that it ought to be answered yes from everything you had heard in the case, could you answer it yes?

MS. HEARN: Yes, if the [4620] State proved that he would be a continuing threat to society.

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